

Choudhary (Migration) [2018] AATA 656 (15 March 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Amandeep Choudhary
CASE NUMBER:	1619043
DIBP REFERENCE(S):	BCC2016/2655205
MEMBER:	K. Chapman
DATE:	15 March 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; • cl.820.221(1) of Schedule 2 to the Regulations; and • r.2.03A.

Statement made on 15 March 2018 at 11:49am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 – Registered de facto relationship – Extensive financial records provided – Financial position is significantly intertwined – Photographic evidence of the sponsor and the applicant – Committed relationship – Intend to marry and have children together – Consistent oral evidence

LEGISLATION

Migration Act 1958, ss 5CB, 65, 359

Migration Regulations 1994, rr 1.09A, 2.03A Schedule 2 cls 820.211, 820.221

CASES

Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 26 October 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* ('the Act').
2. The applicant, Mr Amandeep Choudhary, applied for the visa on 11 August 2016 on the basis of the relationship with his sponsor, Ms Nabela Nadeem. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 ('the Regulations'). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a) at the time of the visa application. The delegate was not satisfied that the applicant and the sponsor were in a genuine and continuing de facto relationship as required by s.5CB of the Act. On 14 November 2016, Mr Choudhary applied to the Tribunal for review of the visa refusal decision, providing a copy of that decision with his application.
4. On 4 January 2018, the Tribunal wrote to the applicant, pursuant to subsection 359(2) of the Act, inviting him to provide further information in support of his claims that he and the sponsor are in a spouse or de facto relationship. A response was received on 18 January 2018 enclosing a comprehensive array of material including statements from third parties, employment records, travel documentation, financial records, utility invoices, tenancy documentation, invitations to social engagements, photographs and documents concerning the upcoming wedding of the couple. The aforementioned material contained significant detail regarding the couple's relationship from 2013 until the present time. It has been duly considered by the Tribunal.
5. The applicant appeared before the Tribunal on 9 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Munish Choudhary (the applicant's brother), Mr Lovepreet Singh, Ms Jasmine Stevens and Ms Jessica Betts. The applicant was represented in relation to the review by his registered migration agent (a solicitor) and Counsel.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES AND LAW

7. There is a two stage process for Partner visas. An applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. The issues in the present case are whether the applicant was at the time of the visa application, and remains at the time of the making of this decision, the de facto partner of the sponsor.

WHETHER THE PARTIES ARE IN A DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an

Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

9. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

CONSIDERATION OF CLAIMS AND EVIDENCE

ARE THE OTHER REQUIREMENTS FOR A DE FACTO RELATIONSHIP MET?

10. In assessing whether the applicant and sponsor have been in a de facto relationship, the Tribunal has considered the documentary evidence submitted with the primary application, additional documentary evidence that was provided to the Tribunal and the oral evidence given during the review hearing. Having regard to the principles outlined in the decision of *Jayasinghe v MIMA* [2006] FCA 1700, when considering the circumstances of the relationship at the time of the visa application, the Tribunal has had regard to later events as they tend logically to show the existence of prior facts. The Tribunal observes this is a matter where the applicant furnished it with more extensive evidence that was unavailable to the primary decision maker.

11. *Circumstances of the relationship*

12. The Tribunal has considered all of the circumstances of the relationship, including the following matters, in arriving at its decision concerning the existence of a de facto relationship between the applicant and the sponsor. The Tribunal observes that the applicant and sponsor provided consistent oral evidence, in an open fashion, concerning their relationship. Accordingly, the Tribunal is satisfied the applicant and sponsor provided truthful evidence at the review hearing. The Tribunal was also impressed by the manner in which Mr Munish Choudhary (the applicant's brother), Mr Lovepreet Singh, Ms Jasmine Stevens and Ms Jessica Betts gave their oral evidence and finds they were truthful witnesses at the review hearing.

13. *Financial aspects of the relationship*

14. Extensive financial records for the couple were before the Tribunal in support of the financial aspects of the relationship. They include bank statements, superannuation records, phone accounts, utility invoices, pay slips and taxation records. The bank records reflect accounts held in the names of the couple and with respect to a company account, from which the couple derive a source of income. It is clear to the Tribunal that the couple began enmeshing their finances in late 2013 and at the present time their financial position is significantly intertwined. For example, they have owned a vehicle in joint names, they have joint interests in a company and they have purchased land in the sponsor's name (as the applicant cannot obtain finance due to his visa status) whereupon they are building a home together with contributions from both parties. At the review hearing the applicant and sponsor provided consistent oral evidence as to their employment and business affairs, the necessity for the

purchase of land to be made in the sponsor's name only in order to obtain finance, and the general sharing of expenses for their daily living. The Tribunal was impressed with the candour and direct manner in which the applicant and sponsor provided their oral evidence and finds they were truthful witnesses. Following careful consideration, the Tribunal affords the evidence in support of the financial aspects of the relationship high weight.

15. Nature of the household

16. Extensive documentary evidence was before the Tribunal demonstrating that the couple have resided together for quite some time. This included statements from third parties, tenancy documentation such as a residential lease and tenant ledgers, multiple pieces of correspondence addressed to each member of the couple at the same address, consumer invoices and items pertaining to the registration of vehicles. The Queensland Civil Partnership Certificate dated 12 April 2016 also notes the joint address of the couple. The applicant and sponsor gave consistent evidence regarding their move from Darwin to Brisbane in early 2015 in order to pursue their relationship against the wishes of the latter's father. The oral evidence of Mr Munish Choudhary, Mr Lovepreet Singh, Ms Jasmine Stevens and Ms Jessica Betts was consistent with that of the couple regarding their co-habitation together in Brisbane since that time. The Tribunal found the evidence of these witnesses to be of significant probative value in support of the nature of the household. After careful consideration, the Tribunal affords the evidence in support of the nature of the household high weight.

17. Social aspects of the relationship

18. The applicant placed before the Tribunal more extensive documentary evidence concerning the social aspects of the relationship than was available to the primary decision maker. This included additional third party statements, greeting cards, social media logs and photographs. In particular, the additional photographs depict the sponsor with several members of the applicant's family during a visit to India in 2017. Further, the documentary evidence confirms that the couple have undertaken holidays together from late 2013 at locations such as the Gold Coast, Bali, Singapore, Melbourne and Darwin. The Tribunal also had the benefit of photographs depicting the couple in a variety of social settings in the presence of numerous third parties. The Tribunal considers this photographic evidence to be of probative value in demonstrating the couple have been well known to the wider world as members of a couple.
19. The applicant and the sponsor both gave oral evidence to the Tribunal in a consistent fashion indicating they have a large circle of friends in Australia with whom they socialise. They also informed the Tribunal of the importance they have placed upon socialising with members of the applicant's family in Australia, and of their increasing ability to socialise together with members of the sponsor's family. The Tribunal accepts the evidence provided at the review hearing by the applicant and sponsor concerning the social aspects of their relationship. Mr Munish Choudhary, Mr Lovepreet Singh, Ms Jasmine Stevens and Ms Jessica Betts also provided evidence consistent with the couple being continuously in a relationship since 2013. Of note Mr Munish Choudhary, the applicant's brother, spoke to the acceptance of the couple's relationship from his side of the family. The Tribunal considers the oral evidence of the witnesses to confirm that the applicant and the sponsor are well known as members of a genuine and continuing relationship. Following careful consideration, the Tribunal affords the evidence in support of the social aspects of the relationship high weight.

20. Nature of the persons' commitment to each other

21. The documentary evidence referred to above strongly supports the contention that the applicant and sponsor have been in a committed relationship with each other since late 2013. The oral evidence of the applicant and the sponsor was consistent in that they had purchased land together (albeit the land is legally owned by the sponsor due to the inability of the applicant to obtain finance due to his visa status), plan to marry on 20 July 2018 and wish to have children in the future. Both members of the couple gave evidence that some members of the sponsor's family oppose their union due to religious and cultural differences (the applicant being of Indian origin and the sponsor having Pakistani heritage). This has created difficulty for the couple which has seen them more closely bond in the face of adversity. The Tribunal considers the actions of the couple in moving from Darwin to Brisbane together in early 2015, and having cohabitated continuously since that time, to be suggestive of a strong commitment to each other. The oral evidence of Mr Munish Choudhary, Mr Lovepreet Singh, Ms Jasmine Stevens and Ms Jessica Betts also pointed to the couple having a long standing commitment to one another. Having carefully considered the evidence, the Tribunal is satisfied that the couple have been in a committed, exclusive relationship with each other since October 2013.
22. The Tribunal notes that the Department received adverse information by way of 'dob in' material. Having regard to the overwhelming evidence before the Tribunal supporting the genuineness of their de facto relationship, and noting the opposition to it from some members of the sponsor's family, the Tribunal attributes the adverse material to mischievous behaviour on the part of an opponent to the relationship and affords the material no weight. Evidence was before the Tribunal that increasingly members of the sponsor's family have come to accept the relationship of the couple. Whilst not everyone accepts the relationship currently, the couple hopes in time this will happen. The Tribunal observes that the evidence in favour of the applicant and sponsor having been in a committed relationship since late 2013 is overwhelmingly. That some members of the sponsor's family oppose the union of the couple should not undermine the veracity of their relationship. After careful consideration, the Tribunal affords the evidence in support of the nature of the persons' commitment to each other high weight.

23. Conclusion regarding the de facto relationship

24. Having regard to the matters above, the Tribunal is satisfied that Mr Choudhary and Ms Nadeem are not married to each other, but have had, and continue to have, a mutual commitment to a shared life to the exclusion of all others, and that the relationship between them has been and remains genuine and continuing. The Tribunal is also satisfied they have lived together continuously in Brisbane since early 2015 and that they are not related by family. The Tribunal is therefore satisfied the requirements of s.5CB(2)(a)-(d) of the Act were met at the time of the visa application and continue to be met at the time of this decision.
25. Given these findings, the Tribunal is satisfied that at the time the visa application was made, and at the time of this decision, Mr Choudhary and Ms Nadeem were in a de facto relationship as defined in the Act. The Tribunal is also satisfied that Ms Nadeem was aged over 18 years when she sponsored Mr Choudhary, and further that she is not prohibited from being a sponsoring partner. In addition, the Tribunal is satisfied Mr Choudhary held a substantive visa at the time of application. Therefore the Tribunal finds that Mr Choudhary meets the requirements of clauses 820.211(2) and 820.221(1).

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

26. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless

he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).

27. The requirement in r.2.03A(3) that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of application, unless compelling or compassionate circumstances exist for the grant of the visa, does not apply if:

- (a) the applicant applies on the basis of being in a de facto relationship with a person who has held a permanent humanitarian visa, and who was in a de facto relationship with the applicant and informed the Department of Immigration of the existence of the relationship before that visa was granted: r.2.03A(4)(a); or
- (b) the applicant is in a de facto relationship with a person who is an applicant for a permanent humanitarian visa: r.2.03A(4)(b); or
- (c) if the visa application was made on or after 9 November 2009, the de facto relationship is a relationship that is registered under a law prescribed in the *Acts Interpretation (Registered Relationships) Regulations 2008* as a kind of relationship prescribed in those Regulations.

28. As outlined above, the Tribunal is satisfied that the relationship between the applicant and the sponsor was registered under a relevant law with the Queensland authorities on 12 April 2016. Accordingly, the Tribunal finds that the applicant is not subject to the requirement in r.2.03A(3). Further, the Tribunal is satisfied both the applicant and sponsor were at least 18 years of age at the time of application and therefore the requirement in r.2.03A(2) is satisfied. For these reasons, the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

29. Submissions were made urging the Tribunal to effectively make a finding that the relationship between the visa applicant and sponsor be deemed a 'long-term partner relationship' for the purposes of cl.801.221(2) and (6A) relating to the permanent Subclass 801 Partner Visa. As the current review concerns the Subclass 820 visa refusal decision, and the applicant is not yet the holder of a Subclass 820 visa, the Tribunal confines its decision to that visa application and makes no finding in relation to the criteria for the Subclass 801 visa.

30. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

31. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) of Schedule 2 to the Regulations;
- cl.820.221(1) of Schedule 2 to the Regulations; and

- r.2.03A.

K. Chapman
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).